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In The

Supreme Court of the United States

October Term, 1994

ERBEN A. HUNZIKER, DONALD M. FURMAN, R. FRIEDRICH AND SONS, INC. and BUCK CONSTRUCTION COMPANY, INC.,

Petitioners,

vs.

STATE OF IOWA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Iowa

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE IOWA SUPREME COURT

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QUESTIONS PRESENTED

1. Whether the Iowa Supreme Court's decision construing Iowa's ancient burial protection statutes as pre-existing limitations on Petitioners' property rights presents a special and important question of federal law?

2. Whether the Iowa Supreme Court's recognition of pre-existing statutory limitations on Petitioners' property rights is consistent with *Lucas v. South Carolina Coastal Council* and other decisions of this Court?

3. Whether an issue of claim assignability is properly presented by the petition of developer-landowners whose standing to allege a regulatory taking was unchallenged below?

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The Respondent State of Iowa respectfully opposes the Petition for Writ of Certiorari to review the opinion and judgment of the Iowa Supreme Court entered in the above-captioned case on July 27, 1994.

OPINIONS BELOW

The Iowa Supreme Court issued its decision on July 27, 1994. The decision is published as *Hunziker v. State,*

519 N.W.2d 367 (Iowa 1994). The decision denying rehearing was issued September 21, 1994. The decisions are reprinted in appendices to the Petition.

JURISDICTION

The Petition invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1257.

STATEMENT OF THE CASE

A millennium or more before Iowa was admitted to statehood, Native American survivors carefully interred their deceased in a burial mound on a bluff overlooking a creek. The land surrounding the mound is now in a residential subdivision developed by Petitioners at the edge of the City of Ames, Iowa.

For more than 150 years Iowa statutes have prohibited disinterment of human remains without lawful authority. Iowa Code section 716.5(1) makes it a crime to disinter human remains from a burial site without lawful authority. This statute was derived from Section 88 of "An Act defining Crimes and Punishments," approved January 25, 1839, and compiled in *Laws of Iowa, 1838-39*, p. 75.

In 1978 the Iowa General Assembly enacted a more specific limitation authorizing the State Archaeologist to permit disinterment at ancient burial sites and expressly making disinterment of ancient human remains without the State Archaeologist's permission a crime. Chapter

1029, §§ 6, 50, 1978 Iowa Acts, adding Iowa Code section 305A.9 (recodified as 263B.9) and subsection 716.5(2).

A decade later, in 1988, Petitioners bought an undeveloped 59-acre parcel including a wooded hillside at the edge of Ames. They subdivided the parcel into 124 residential lots. The developers platted the lots in a configuration which placed the ancient human grave on the only buildable part of one lot (Lot 15). The grave is a visually discernable circular mound more than 3 feet high at the center with a diameter of about 34 feet occupying about two one-hundredths (.02) of an acre on a bluff top overlooking a creek. Lot 15 comprises four one-tenths (.4) of an acre. The Iowa State Archaeologist was not aware of the existence of the mound. The developers did not recognize it as a human burial mound.

Shortly after the developers sold the lot for a residential building site, a person who knew of the mound observed survey stakes nearby and reported that an ancient burial mound was likely to be destroyed. The report led to a cooperative investigation by the State Archaeologist and the developers. The State Archaeologist determined that the mound is a human burial mound in good condition. He further determined that the mound contains ancient human remains in good condition after burial between 1,000 and 2,500 years ago. The State Archaeologist also determined that the ancient human remains have significant archaeological value and should not be disturbed.

The circumstances leading to discovery of the ancient grave, the site investigation, and the reasons for prohibiting disinterment are set forth in "Archaeological Investigations and Osteological Analyses at 13SR18 and 13SR19, Northridge Subdivision, Ames, Story County, Iowa," (Exhibit 1 attached to State's statement of material facts in support of its summary judgment motion in the trial court).

The developers rescinded the sale of Lot 15 and sued on their own behalf for a writ of mandamus compelling the State to condemn the lot. In response to the State's discovery requests, the developers admitted that the State Archaeologist reasonably applied the Iowa burial protection statutes in determining that the ancient human remains should not be disinterred. The developers likewise conceded that the statutes and the Archaeologist's determination advance legitimate state interests. The developers did not challenge the findings of the Archaeologist or his authority. Plaintiff's Responses to State's Requests for Admission Nos. 6 and 7; *Hunziker v. State*, 519 N.W.2d 367, 370 (Iowa 1994) (Petition, Appendix "A" at page A-8).

The trial court granted the State summary judgment on the ground that the developers never had a right to build a house on an ancient grave as Iowa statutes expressly regulating disinterment of ancient human burials were enacted before the developers bought the 59-acre parcel. Petitioners acquired title in 1988 subject to pre-existing limitations. No compensable taking occurred. The Iowa Supreme Court affirmed on the same ground.

REASONS TO DENY THE PETITION

I. THE IOWA SUPREME COURT'S DECISION CONSTRUING IOWA'S ANCIENT BURIAL PROTECTION STATUTES AS PRE-EXISTING LIMITATIONS ON PETITIONERS' PROPERTY RIGHTS DOES NOT PRESENT A SPECIAL AND IMPORTANT QUESTION OF FEDERAL LAW.

Petitioners ask the Court to review an esoteric species of state statute which has very little regulatory impact on private property. Litigation involving regulation of ancient human burials on private property is rare. In addition to the opinion below, there appears to be only one other published opinion of any state appellate court concerning regulation of ancient human burial sites on private property. *Thompson v. City of Red Wing,* 455 N.W.2d 512 (Minn. App. 1990) (ordering dismissal of unripe inverse condemnation claim).

The impact of Iowa's ancient human burial protection law is necessarily limited by its narrow scope. It does not prohibit disinterment of artifacts or every ancient human bone which might be encountered. Reasonably applied here, as conceded by the petitioners, the statute prohibits disturbance of a grave occupying two one-hundredths (.02) of an acre or only three ten-thousandths (.0003) of the 59-acre parcel which the developers bought and subdivided.

The developers lost the sale of one lot out of 124 because they platted the lots in a configuration which inadvertently placed the mound on the only buildable part of a single lot. Their financial loss was insignificant in relation to their receipts from the sale of the other 123

lots. Compared, for example, with the geographical reach of laws limiting development of beaches and wetlands, the land areas affected by ancient burial protection laws are isolated and minute. The statute does not purport to authorize public access to ancient graves on private property. It only authorizes the State Archaeologist to prohibit disinterment. The relevant text is quoted in the opinion below (Petition, Appendix at p. A-7). This statute does not authorize any "land grab" that could sweep across a state. *See Stevens v. Cannon Beach*, ___ U.S. ___, 114 S.Ct. 1332, 1335, 127 L.Ed.2d 679, 682 (1994) (Scalia, J., dissenting from denial of certiorari).

II. THE IOWA SUPREME COURT'S RECOGNITION OF PRE-EXISTING STATUTORY LIMITATIONS ON PETITIONERS' PROPERTY RIGHTS IS CONSISTENT WITH *LUCAS V. SOUTH CAROLINA COASTAL COUNCIL* AND OTHER DECISIONS OF THIS COURT.

The Iowa Supreme Court properly distinguished this case from *Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). After Lucas bought two expensive beach-front lots the legislature enacted a statute enabling the coastal council to prohibit beach-front building construction. In contrast, Petitioners here bought undeveloped land a decade after enactment of Iowa's statutes which specifically regulate disinterment of ancient burials.

Additionally, Petitioners first acquired title to the property more than a century and a half after enactment of Iowa's laws making it a crime to disinter human remains. The current disinterment prohibition in Iowa

Code subsection 716.5(1) is derived from the 1839 enactment of the territorial legislature prohibiting disinterment. Section 88 of "An Act defining Crimes and Punishments," approved January 25, 1839, and compiled in *Laws of Iowa, 1838-39*, p. 75. Thus, the general disinterment limitation was part of the criminal law of Iowa before the United States opened the land in issue for public sale.

The grave on Petitioners' land is like the earthquake fault zone mentioned in *Lucas*, ___ U.S. ___, 112 S.Ct. at 2900, 120 L.Ed.2d at 821. Here, Petitioners conceded below that pre-existing statutes were reasonably applied to a recently discovered condition of the land. The State Archaeologist did not prohibit a use that was previously permissible under relevant property principles.

Recognition that the Takings Clause does not require compensation when an owner is barred from putting land to a use that is proscribed by those "existing rules or understandings" is surely unexceptional. *Lucas*, ___ U.S. ___, 112 S.Ct. at 2901, 120 L.Ed.2d at 822. The Iowa Supreme Court properly applied *Lucas*. In contrast to the circumstances in *Lucas*, here the limitation on the use of the land "inhered in the plaintiff's title." *Hunziker v. State*, 519 N.W.2d 367, 371 (Iowa 1994) (Petition, Appendix "A" at pp. A-10, A-11).

Lucas was decided recently. State appellate courts have had little opportunity to apply it. The facts here are a far cry from the facts in *Lucas*. The Iowa Supreme Court's reasonable application of *Lucas* in this case does not provide any reason to revisit *Lucas*.

The Petition also erroneously contends that the decision below conflicts with a line of pre-*Lucas* decisions rejecting facial challenges to statutes and ordinances on grounds of lack of finality. The Petition (at page 18) inaccurately states that the Iowa Supreme Court "incorrectly established 1978 as the date of ripeness and the date of taking, based on the premise that the Ancient Human Remains statutes were passed in 1976 and 1978." The Iowa Supreme Court's opinion contains no such holding, and no suggestion that the statute could have been invalidated by a facial challenge at the time of its enactment.

Rather, as the trial court observed, Petitioners could have avoided loss by investigating the property more thoroughly before buying a woodland bluff for intensive residential development. Hunziker v. State, Iowa District Court for Story County, No. 34771-1091, November 4, 1992 Order (granting State's summary judgment motion) at page 16. If they wished to minimize their risk they could have done an inexpensive archaeological reconnaissance before platting their subdivision. The risk was small; their resulting loss is small.

III. ASSIGNABILITY OF A REGULATORY TAKING CLAIM IS NOT PROPERLY PRESENTED AS AN ISSUE BY THE PETITION OF DEVELOPER-LANDOWNERS WHOSE STANDING TO ALLEGE A REGULATORY TAKING WAS NOT CHALLENGED BELOW.

The Petition (at page–23) states that the Iowa Supreme Court's majority opinion, without discussion, correctly recognized that Petitioners had taken an assignment of their purchaser's inverse condemnation claim.

There was no need for the courts below to discuss assignment because the State never challenged Petitioners' standing to petition for a writ of mandamus compelling condemnation of the ancient burial mound.

Assignability of an inverse condemnation claim was never an issue in this litigation. Petitioners are trying to manufacture an issue that never existed on the undisputed facts below. A ruling by this Court that a regulatory taking claim is assignable would not help Petitioners whose only arguable assignment was an assignment back from the purchaser who bought Lot 15 from them. This non-issue cannot now be a reason to grant the Petition.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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